not be so powerless as to allow the situation to develop. The doctrine of necessity can always be invoked to prevent it from happening. Just as ex necessitate the Yang di-Pertuan Agong is authorized by the Constitution to declare a state of emergency when he is satisfied that an emergency situation exists, similarly ex necessitate the magistrate is competent and obliged to adjudicate even though he is *prima facie* disqualified for interest or bias, if declining to do so, would lead to failure of justice. There are many cases and instances in other common law jurisdictions in which the doctrine of necessity was successfully invoked and applied. To quote as an example, the Judges of Saskatchewan were held to be under an obligation *ex necessitate* to judge upon the constitutionality of a legislation rendering them liable to pay income tax on their salaries. (*The Judges* v. *Attorney-General for Saskatchewan.*[1]). But the doctrine must not be used to camouflage an arbitrary power. While it can be invoked to prevent failure of justice it must not be used as an affront of justice. This means that so long as the trial or adjudication is held in accordance with the recognized procedure which is designed to achieve impartiality and fair trial, no disqualification *ex necessitate* can vitiate that trial (*de Smith,* 4th ed. pp.251 and 276).

In our system not only is there no room to doubt the existence of legal bias, but also our law of procedure and evidence meets the required standard designed to ensure fair and impartial trial and to prevent miscarriage of justice. We, therefore, see no substance in this application.

There is, however, one other matter we would like to comment here, and that is this: The filing of this application to the Federal Courts was accompanied by such a fan-fare in the local newspapers (please refer to *"The Star"* dated April 10, 1984) that we cannot help concluding that the details of the case reported in the press could not be otherwise than the result of prior interview between the solicitors and newspaper reporters. We view this very seriously as the practice only serves to mislead the public and also embarrasses the court. In this case it was in the press that the several questions were posed for the Federal Court's determination whilst the application was not yet brought to our attention. We think lawyers should refrain themselves from briefing the press on matters pending before the court, especially when they have not been properly before it. We would like to remind them of rules 45, 46 and 47 of the Legal Profession (Practice and Etiquette) Rules 1978, which seem to us to be relevant in the circumstances of this case. We hope that the rules are not dead letters.

Our answer to the question is in the negative and we order that the trial must commence without further delay.

Seah F.J. (giving supporting judgment): I agree with the judgment which has just been delivered by the learned the Lord President. I would, however, like to add a few words. Speaking generally, the conduct of criminal trials in Malaysia is regulated by the Criminal Procedure Code (as amended) (F.M.S. Cap. 6) and section 439 enacts that "No Magistrate shall, except with the permission of the High Court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party or personally interested". And it is expressly provided by section 417 that whenever it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be had in any court subordinate thereto, the High Court may order the inquiry or trial to be heard by another criminal court of equal or superior jurisdiction. If the application is made by accused person, it should be by way of motion and be supported by affidavit (see section 418). In my opinion, such a procedure should be followed in future cases if there is any complaint against the alleged partiality or bias of the trial Magistrate or President of the Sessions Court.

Order accordingly.

Solicitors: *Mahadevi Ganeshmurugan & Co.*

GOVERNMENT OF THE STATE OF NEGERI SEMBILAN & ANOR. v. YAP CHONG LAN & 12 ORS. LESCO DEVELOPMENT CORPORATION SDN. BHD. v. YAP CHONG LAN & 12 ORS.

[F.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Abdoolcader F.JJ.) June 7 & 22, 1984]

[Kuala Lumpur – Federal Court Civil Appeals Nos. 86 and 101 of 1984]

Land Law – State land occupied on permission given by Collector of Land Revenue – Land subsequently alienated to development company – Validity of alienation – Portions of land consisting of vegetable garden reserve – Discretion of court in making declaration of invalidity – Whether persons occupying the land have acquired any equitable right or interest to remain on the lands allocated to them – Application of doctrine of equitable estoppel – Public law – National Land Code, ss. 5, 48, 62, 76 & 78.

Practice & Procedure – Proceedings under the National Land Code – Whether State Government a proper party – National Land Code, ss. 12 & 16.

In this case the respondents who were living in houses built by them on land in Seremban for which they paid ground rent to the registered proprietor were informed that the land had been acquired by the State Government for a road widening project. The respondents appealed to the Collector for time to vacate and either for low cost houses or State land. Subsequently they were offered and agreed to accept varying amounts by way of compensation and were also reallotted lots of land in Ulu Temiang for resettlement. They submitted applications for State land in that area. The lots allotted to the respondents were demarcated by wooden pegs and they were permitted by the Collector to build their houses on their respective lots. In the event not only were the respondents given no title but the land occupied by them was alienated to Lesco for a term of ninety nine years. Lesco was to develop the land into a housing estate and accordingly called on the respondents and other families settled on the land to quit up and deliver possession of the parts occupied by them and to demolish and remove the buildings erected thereon. An offer was made for compensation and an option to purchase a low cost house in the proposed housing estate at a reduced price and temporary accommodation in the meanwhile. Several families resettled on the land accepted the offer but the respondents refused and instituted proceedings against the appellants. Two main issues were raised in the proceedings (1) whether the respondents have acquired an equitable right or interest to remain on the respective lots allocated to them and (2) whether the alienation of the land in question to Lesco was bad in law and therefore void. A preliminary objection was also raised to the joinder of the State Government as a party to the proceedings. Peh Swee Chin J. who heard the actions held on the preliminary objection that because of the various declarations sought against it the State Government should be a proper and necessary party. On the first issue he held that the doctrine of equitable estoppel arose and was binding on Lesco. To satisfy this equity he ordered Lesco to pay monetary compensation to the respondents and that on payment of such compensation the respondents were to quit and vacate the land. The appellants appealed against this order. The respondents cross-appealed on the finding of the learned judge on the second issue that the alienation of the land in question to Lesco was not illegal or void.

Held: (1) the State Government as such has nothing to do with proceedings under the National Land Code. It is the State Authority that is the pertinent entity. The State Government should never have been joined in the proceedings and on the preliminary objection taken, it should have been discharged as a party thereto;

(2) the compelling provisions of section 64 of the National Land Code can hardly be said to be merely directory and the phraseology of the provisions of sub-section (2) thereof clearly connotes a mandatory requisition which necessitates compliance therewith before a reservation can be said to have been revoked. Until and unless revocation has been effected under section 64 reserved land will continue as such;

(3) in view of the minimal area of the land which is reserved, the fact that it is possible to sever the parts reserved from the rest of the land alienated and the fact that the reservation can be revoked at any time and even retrospectively, the court would exercise its discretion to refuse to declare the alienation of the land to Lesco to be invalid;

(4) the equity sought to be raised by the respondents against the State Authority would establish rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner. The application of the doctrine of equitable estoppel and the injection of equity in the circumstances were misconceived;

(5) the respondents' claims for relief must therefore be dismissed.

Cases referred to:

(1) *Tan Sri Haji Othman Saat* v. *Mohamed bin Ismail* [1982] 2 M.L.J. 177, 178-179.
(2) *Pow Hing & Anor.* v. *Registrar of Titles, Malacca* [1981] 1 M.L.J. 155, 157.
(3) *Ng Yit Seng & Anor.* v. *Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.* [1981] 2 M.L.J. 194, 195.
(4) *Thames Water Authority* v. *Elmbridge Borough Council* [1983] 2 W.L.R. 743.
(5) *Dunkley* v. *Evans* [1981] 1 W.L.R. 1522, 1524-1525.
(6) *Ramsden* v. *Dyson* (1866) L.R. 1.H.L. 129.
(7) *Sidek bin Haji Muhamad & 461 Ors.* v. *Government of State of Perak & Ors.* [1982] 1 M.L.J. 313, 314.
(8) *Pemungut Hasil Tanah Kota Tinggi v. United Malayan Banking Corporation* [1981] 2 M.L.J. 264.
(9) *Newbury District Council* v. *Secretary of State for the Environment* [1981] A.C. 578.
(10) *Pioneer Aggregates (U.K.) Ltd.* v. *Secretary of State for the Environment & Ors.*, The Times, 20th June 1983.
(11) *Cudgen Rutile (No. 2) Pty. Ltd.* v. *Chalk* [1975] A.C. 520.
(12) *Watson's Bay and South Shore Ferry Co. Ltd.* v. *Whitfeld* (1919) 27 C.L.R. 268.
(13) *Western Fish Products Ltd.* v. *Penwith District Council & Anor.* [1981] 2 All E.R. 204.

CIVIL APPEAL.

Mohamad Ghazali bin Yusof (State Legal Adviser, Negeri Sembilan for appellants in Civil Appeal No. 86 of 1984.

G. Krishnan (*K.G. Chan* with him) for the appellants in Civil Appeal No. 101 of 1984.

Joseph Chia for the respondents.

Cur. Adv. Vult.

Abdoolcader F.J. (delivering the judgment of the Court). These two consolidated appeals, by the Government of the State of Negeri Sembilan and the Commissioner of Lands and Mines, Negeri Sembilan (whose correct designation however should be the Director of Lands and Mines by virtue of the amendment effected by P.U. (B) 324 of 1970) in Civil Appeal No. 86 of 1984, and Lesco Development Corporation Sdn. Bhd. ('Lesco') in Civil Appeal No. 101 of 1984, relate basically to the claim of the respondents to an equitable right to remain on their respective lots

on the land in Ulu Temiang in the Mukim of Seremban on which they have been resettled. The respondents originally had also sued the Collector of Land Revenue, Seremban ('the Collector') and the Registrar of Titles, Negeri Sembilan but at the inception of the hearing in the High Court withdrew the claim against them.

It will be necessary to briefly set out the factual background of this matter, without however requiring any extensive introgression into details as in our view the issues that arise for determination are primarily matters of law. The respondents who were living in houses built by them on some land in Rahang Kecil in the Township of Seremban and paying ground rent to Seremban Enterprise Ltd., the registered proprietor thereof, were informed in April 1972 that a portion of this land had been acquired by the State Government for a road widening project. The respondents then appealed to the Collector for time to vacate and either for low cost houses or State land, and in due course they were asked to attend an inquiry before him which they did with regard to compensation as a result of the acquisition. They were offered and agreed to accept varying amounts by way of compensation and were also allotted lots of land in Ulu Temiang for resettlement. They also appeared before the State Land Committee and it would appear, as the State Legal Adviser conceded in the course of the trial, that the respondents did submit applications for State land in that area. The lots allotted to the respondents were demarcated by wooden pegs and they were permitted by the Collector to build houses on their respective lots and were able to obtain water supply on his recommendation. So much is agreed between the parties but the area of serious dispute between them is whether the respondents were only permitted to stay at Ulu Temiang *pro tempore* as alleged by the appellants or whether, as the respondents contend, they were allowed to reside there permanently with a promise of a State lease for a term of ninety nine years in respect of the lots allocated to them.

In the event not only were the respondents given no title but the land in question occupied by them was alienated to Lesco in May 1981 for a term of ninety nine years. Lesco was to develop the land in question into a housing estate to be known as Taman Muhibbah and accordingly called on the respondents and the other families settled there to quit and deliver up vacant possession of the parts occupied by them and demolish and remove the buildings erected thereon and coupled this with an offer to each of them of compensation and an option to purchase a low cost house in the proposed housing estate at a reduced price and temporary accommodation in the meanwhile. Several other families resettled on the land in question accepted the offer but the respondents adamantly refused and instituted the present proceedings to advance claims against the appellants which raise two main issues for determination, namely, (1) whether the respondents have acquired an equitable right or interest to remain on the respective lots allocated to them, and (2) whether the alienation of the land in question to Lesco is bad in law and therefore void.

This action was heard by Peh Swee Chin, J., who in a reserved judgment delivered on February 25, 1984 held on the first issue that the Collector did intimate to the respondents that they would be allowed to remain on the land on a permanent basis and that they would be given leases for a term of ninety nine years in respect of the lots allocated to them, and on an application of the doctrine of equitable or promissory or proprietary estoppel, as it is variably termed, that the respondents have at all times been licensees of the land occupied by them coupled with an equity and that Lesco had notice or actual knowledge of the circumstances under which the respondents moved to Ulu Temiang and built their houses on the land in question and that the equity arising in consequence of these circumstances against the other two appellants would therefore be binding on Lesco. To satisfy this equity he ordered Lesco to pay monetary compensation in the sum of $25,000 to each of the respondents except the 8th and 9th respondents who would jointly receive that amount, and that on such payment the respondents should quit and vacate the land within two months thereafter and made consequential directions for the demolition of their houses and the expenses in connection therewith, awarding costs to the respondents and certifying for two counsel. All the three appellants now appeal to this court against this order and the respondents cross-appeal on the finding of the learned Judge on the second issue that the alienation of the land in question to Lesco is not illegal or void as contended by them on the grounds that the provisions of section 64(2) of the National Land Code, 1965 ('the Code') are directory or, as he put it, 'in other words a mere formality' and therefore did not vitiate the alienation to Lesco. To obviate prolixity, all references to statutory provisions in this judg-

ment are in respect of the Code unless otherwise specifically stated.

At the inception of the hearing the State Legal Adviser who appeared for the State Government and the Director of Lands and Mines took a preliminary objection to the joinder of the State Government as a party to the proceedings in view of the provisions of section 16(2). The learned Judge deferred his decision on this point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that 'because of the various declarations sought against it' the State Government 'should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein'. We must with respect say that this is a paralogism as it involves the fallacy of *petitio principii;* it begs the question as there can be no question of any relief being accorded against the State Government if it is not a proper party. The State Government as such has nothing to do with proceedings under the Code. It is the State Authority that is the pertinent entity, and State Authority is defined in section 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the State Authority to appoint a Director of Lands and Mines for the State and sub-section (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the State Authority, and sub-section (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the State Government should never have been joined in the proceedings and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the Government of a State as such in relation to the Code with the resultant indiscriminate misjoinder of State Governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.

It might be convenient to first dispose of the second issue – the question of the validity of the alienation of the land in question to Lesco. It would appear from the evidence that the land in question at Ulu Temiang was alienated to Lesco under five titles which comprised part of a larger piece of land which had been gazetted in 1927 as a vegetable garden reserve under section 9 of the Land Enactment, 1911 which was the precursor to the equipollent provisions of the Code in relation to the reservation of land. Before the land was alienated to Lesco however there had been partial revocation of portions of this reserve by gazette notifications between 1951 and 1953 and when this action was heard only four of the five titles alienated contained portions of vegetable garden reserve.

The first matter to consider on this aspect would be the standing of the respondents to complain in this regard. The respondents say they did submit applications for alienation of the land in question to them by way of State leases, and this as we have said earlier is conceded by the State Legal Adviser. This gives them a real or genuine interest in the subject matter of the proceedings instituted which clearly accord them capacity to sue [*Tan Sri Haji Othman Saat* v. *Mohamed bin Ismail*[1]], but it may well be proper, when it comes to the question of discretion on a consideration of the substantive application for the declaration sought (and this is a discretionary remedy) as to the validity of the alienation to Lesco, to refuse a remedy to the respondents who, though they may have standing as a matter of jurisdiction, do not merit it (*ibid.* at page 179).

Reserved land is defined in section 5 to mean land for the time being reserved for a public purpose in accordance with the provisions of section 62 of any previous land law, and section 62(4) provides that reserved land shall not be (a) disposed of by the State Authority except, to paraphrase its provisions, by way of lease for a period not exceeding twenty one years in accordance with the provisions of section 63 or by way of a temporary occupation licence or a permit for the extraction and removal of rock material as provided for in the requisite provisions of the Code, or (b) used for any purpose other than that for which it is reserved except in pursuance of a disposition made by virtue of any of the provisions referred to in paragraph (a). We pause to observe that 'disposal' is defined in section 85 to mean any disposal of land made by the State Authority in the exercise of any of the powers conferred by section 42, and 'State land' is defined therein to exclude, *inter alia,* reserved land. We would add that the alienation of the five titles to Lesco was made under section 76 which sets out the meaning of alienation of State land which as we have pointed out excludes reserved land, and 'alienate' itself

is defined in section 5 to mean to dispose of State land. Section 64 makes provision for the revocation of the reservation of any land for a public purpose, and the procedure therefor is strictly stipulated in sub-section (2) thereof.

No revocation of the reserved land comprised in parts of the four titles alienated to Lesco has in fact been effected under the provisions of section 64(2) but the learned Judge held that the provisions of this subsection are directory and not mandatory, that compliance therewith in the circumstances of this case would be a mere formality and that the failure to formally revoke the subsisting vegetable garden reserve in the affected portions of the four titles pursuant to the stipulated statutory provisions did not vitiate the alienation of the land in question to Lesco. We must dissent on his conclusion as to the purport and effect of section 64. The compelling provisions of section 64 can hardly be said to be merely directory, and the phraseology of the provisions of subsection (2) thereof clearly connotes a mandatory requirement which necessitates compliance therewith before a reservation can be said to have been revoked. Applying the test laid down in the judgment of this court in *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[2] and even on a consideration of the adhibition of the doctrine of substantial compliance enunciated by this court in *Ng Yit Seng & Anor.* v. *Syarikat Jiwa Mentakab Sdn. Bhd. & Ors.*[3], it is clearly manifest that until and unless revocation has been effected under section 64, reserved land will continue as such, and compliance with this statutory requirement as a prerequisite to revocation cannot be circumvented by treating an essential legislative stipulation as a mere formality.

There are however several other considerations which *ex necessitate rei* enter into the picture. The third respondent who appears from the record as the prime mover in these proceedings and to be the collective voice and mind of the other respondents as well has his house No. 315A standding on a portion of the reserved land in contravention of the specific provisions of section 62(4) and has hardly therefore any cause for complaint, as what is alleged against Lesco equally redounds on him. On the evidence of a chartered surveyor called by Lesco to testify, the subsisting vegetable garden reserve consists of only forty five acres and after deducting a portion within this which is reserved for the National Electricity Board the remaining affected area would only be seventeen acres. In considering the feasibility of granting a declaration as to the validity of the alienation to Lesco we have to take this into account and the fact that it would be possible to sever the parts comprising the vegetable garden reserve from the rest of the land alienated [*Thames Water Authority* v. *Elmbridge Borough Council*[4] applying *Dunkley* v. *Evans*[5]], and we should point out that the affected area would be comparatively minimal. In any event the reservation can be revoked at any time and even retrospectively, and that this was and is intended to be done is borne out by the evidence of the Acting Director of Lands and Mines who testified that the present proceedings precluded earlier action to this end.

The cumulative effect of the several matters we have adumbrated impel us to exercise our discretion to refuse the declaration sought as to the invalidity of the alienation of the land in question to Lesco. We accordingly affirm but for wholly different reasons the decision of the learned Judge on this issue and dismiss the cross-appeal of the respondents with costs.

Adverting now to the primary issue in this matter, scilicet, the respondents' claim that they have acquired an equitable right or interest to remain on the respective lots allocated to them, the learned Judge acceded to this contention by applying the doctrine of equitable estoppel propounded in *Ramsden* v. *Dyson*[6] and a concatenation of congeneric cases, and went on to hold that on the facts the respondents were at all times licensees coupled with an equity. It would appear that misguided enthusiasm in claiming and resisting the application of the doctrine of equitable estoppel only generated a dispute on the facts of the matter and blinded all concerned to the necessity of considering its application in the circumstances of this case as a matter of law. No consideration appears to have been given on all sides to the concept of equitable estoppel in the sphere of public law where a statutory or public authority is involved as in the case before us, and when we raised this question counsel for the respondents merely repeated the submissions he made before the learned Judge and which, we sense, were put forward with rather more hope than confidence.

We have earlier referred to the factual dispute between the parties on this aspect, with the respondents contending that they were permitted to stay there on a permanent basis with a promise of title to the land they occupied and the Director of Lands and Mines denying any such arrangement.

We indicated to counsel on both sides that although this aspect and the finding of the learned Judge in favour of the respondents' contention on the evidence adduced form part of the grounds of appeal, we were prepared to assume in favour of the respondents' factual contention in considering the question of law as to the applicability of the doctrine of equitable estoppel in the circumstances, and invited arguments on this basis.

It is necessary in the first instance to consider the authority of the Collector to bind the State Authority in making the commitment alleged by the respondents. He had no authority in our view to purport ot commit the State Authority even if he did give the assurances alleged [*Sidek bin Haji Muhamad & 461 Ors.* v. *The Government of the State of Perak & Ors.*(7)]. The State Authority may under the provisions of section 13 delegate the exercise or performance of any of its powers or duties to the Collector, and on the evidence of the Acting Director of Lands and Mines the Collector has by N.S.P.U. No. 19 of 1969 with the concurrence of the District Land Committee only been delegated with authority to approve the conversion of land not exceeding three acres in area for agricultural purposes, and he has no power to alienate land regardless of acreage for housing. Section 48 prescribes that no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever, and section 78(3) provides that the alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in subsection (1) or (2), and notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time. These statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity in regard to the respondents' claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code [*Pemungut Hasil Tanah, Kota Tinggi* v. *United Malayan Banking Corporation Berhad*(8)].

On the matter of the concept of equitable estoppel in public law, we would refer to the decision of the House of Lords in *Newbury District Council* v. *Secretary of State for the Envrionment*(9) in which Lord Fraser of Tullybelton deprecated (at page 606) the introduction of 'an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land', and he went on to add that 'to do so would lead to uncertainty and confusion'. Lord Scarman in the course of his speech said (at page 616): 'In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, whicl. binds everyone', and he continued (at page 617): 'My Lords, I agree with the view so consistently expressed by Lord Parker, C.J., that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law'. This case was followed and applied by the English Court of Appeal in *Pioneer Aggregates (U.K.) Ltd.* v. *Secretary of State for the Environment & Ors.*,(10)

In *Cudgen Rutile (No.2) Pty. Ltd.* v. *Chalk*(11) the Judicial Committee of the Privy Council held that if certain authorities to prospect issued under the Mining Acts of Queensland contained an agreement by the Minister to grant mineral leases, that agreement was not authorised by the statutes which required a series of steps to be taken, decisions to be made and discretion to be exercised, before the Minister was empowered to grant a lease. Fundamental to the decision was the proposition that the Crown cannot contract for the disposal of Crown lands without statutory authority and that the agreement in question was not authorised because it was an anticipatory fetter on the exercise of a discretion which, according to the statute, had to be exercised in the public interest at the end of the prescribed procedure. To the same effect was *Watson's Bay and South Shore Ferry Co. Ltd.* v. *Whitfeld*(12) which was referred to with approval and applied in *Cudgen Rutile (supra).* We would refer again in this context to *Sidek bin Haji Muhamad* (*supra,* at page 314).

In *Western Fish Products Ltd.* v. *Penwith District Council & Anor.*(13) a firm purchased a disused factory for the purpose of manufacturing fish products and incurred expenditure after being told orally on behalf of the local authority's chief planning officer that application for a 'established use' certificate would be 'purely a formality'. The local authority eventually refused the certificate and refused planning permission. The English Court of Appeal held that in any event an estoppel could not be raised to prevent a statutory body exercising its statutory discretion or performing

its statutory duty, and therefore, even if the council's officers while acting in the apparent scope of their authority had purported to determine the plaintiffs' planning application in advance, that was not binding on the council because it alone had power under the Town and Country Planning Act, 1971 to determine the applications. Dismissing the firm's claim, the court held that there were only two kinds of exception to the principle that a public authority could not be estopped from exercising its duties and powers. One exception was where it had statutory power to delegate functions to its officers and there were special circumstances to justify the applicant in thinking that the officer thus had power to bind the authority by an irrevocable decision, and the other exception is where the authority waives a procedural requirement relating to some application made to it, whereupon it may be estopped from relying on the lack of formality. Neither of these exceptions apply to the proceedings before us, and in the light of the statutory provisions we have referred to and the authorities we have discussed it would appear that the equity sought to be raised by the respondents would establish against the State Authority rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner.

The application of the doctrine of equitable estoppel and the injection of equity in the circumstances was misconceived and the learned Judge's conclusion on this issue cannot therefore be sustained. The respondents' claim on the primary issue must therefore fail. We accordingly allow this appeal with costs here and in the court below, set aside the order of the learned Judge and dismiss the respondents' claims for relief in their action. The deposit lodged in court by way of security will be refunded to the appellants.

Appeal allowed.

Solicitors: *Yazid Baba & Partners; Gunaretnam & Co.*

ONG AH MAI v. LING POOI MING

[O.C.J. (George J.) May 6, 1983]
[Kuala Lumpur – Originating Summons No. 155 of 1979]

Practice & Procedure – Custody and maintenance – Consent Order – Divorce proceedings not pending – Whether court had jurisdiction to grant ancillary relief before decree nisi – Law Reform (Marriage & Divorce) Act 1976, ss. 47, 52 & 82 – Married Women and Children (Maintenance) Ordinance 1950 – Courts of Judicature Act 1964, s. 24(d).

Jurisdiction – Custody and maintenance applications – Court had no jurisdiction to make orders pertaining to division of family property or for parties to file divorce proceedings before decree nisi.

Family Law – Custody and maintenance applications – When court can make orders pertaining to division of family property or for parties to file divorce proceedings.

On March 9, 1979 the applicant on her behalf and on behalf of two of her children took out Originating Summons No. 155/79 in which her husband, the father of her two said children, was the respondent. The application was for, *inter alia*, custody of the two children and for maintenance for the wife and the said children. Divorce proceedings were not pending. The learned Judge made a consent order.

The applicant sought to set aside the consent order or at least items (iii) and (viii) thereof on the ground that the court had no jurisdiction to make the order. The wife also asked the court to direct that the question of division of matrimonial property may be resolved by the parties in divorce proceedings.

Items (i) and (ii) of the order of April 19, 1982 dealt with maintenance to be paid by the husband. By item (iii), the husband was to transfer certain immovable property to the wife. Items (iv), (v), (vi) and (vii) dealt with the custody of and access to the children of the marriage. By item (viii), the husband and the wife were by consent ordered to file a "mutual consent divorce petition" under section 82 of the Law (Marriage and Divorce) Act 1976. Item (ix) dealt with medical and dental expenses of the children and with their education. Item (x) dealt with costs of the proceedings and item (xi) had the effect of vacating all previous orders made in the matter.

The issue before the court was whether the Judge who made the consent order had the jurisdiction to do so.

Held: (1) the proper place and time to consider the weight to be given to the agreement between the parties that resulted in the making of the consent order is the court sitting in its divorce jurisdiction hearing an application for ancillary relief after a decree *nisi* dissolving the marriage has been made;

(2) the jurisdiction of the learned Judge who made the consent order was not that of a judge hearing an application for ancillary relief after a decree of dissolution of marriage but that conferred on him by section 24(d) of the Courts of Judicature Act 1964 and the Married Women and Children Maintenance Ordinance 1950, the former